

Humanizing the Power to Arrest

NAB's Arrest in the Context of Human Rights

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Summary

- 1) *Magna Carta Libertatum*, Petition of Rights, Bill of Rights, US Constitution and French Declaration of the Rights of Man initially enshrined basic human rights that are now well-protected under binding UDHR, ICCPR, IESCR CAT, and national constitutions.
- 2) Mankind has certain inalienable rights and State has the right to arrest an accused. How to strike a balance between these two competing principles;
- 3) The criminal law in Pakistan confers powers on the courts to grant bail even to murderers and terrorist; however, NAO denies the right of bail; hence, NAB's power to arrest needs to be interpreted to protect the overriding Fundamental Rights.
- 4) The relevant human rights are:
 - 8) Elimination of Exploitation (Article 3 of CoP);
 - 9) Due Process of Law (Article 4 CoP and Article 7 of UDHR);
 - 10) Security of Person (Article 9 CoP, Article 3 of UDHR, Article 6 of ICCPR and Article 5 of ECHR);
 - 11) Right to A Fair Trial (Article 10A of CoP, Article 10 of UDHR and Article 15 of ICCPR);
 - 12) Freedom of Movement (Article 15 of CoP, and Article 13 of UDHR);
 - 13) Presumption of Innocence (Article 11 of UDHR, Article 14 of ICCPR, Article 19 of Cairo Declaration on Human Rights in Islam, Hadith: Al Tirmizy, No. 1424, Al Hakim, No. 4384);
 - 14) Right to Dignity (The Quran: 17:70, Article 14 of CoP, Article 1 of UDHR and Article 10 of ICCPR).
- 5) Human Rights Standard and Practice For the Police, United Nations, 2004, and Code of Conduct for Law Enforcement Officials, General Assembly

(1979) prescribe that no one shall be subjected to arbitrary arrest and pre-trial detention shall be the exception, rather than the rule to protect dignity.

- 6) Arbitrary detention is the violation of the right to liberty:
 - a. Arbitrary arrest refers to the inappropriate, unjust, unforeseeable or disproportionate nature of the detention, not proportional to the legal objectives, discriminatory, without fair, solid and substantial cause and unduly intrusive vis-à-vis other rights;
 - b. Article 7 of Rome Statute of ICC declares that ‘imprisonment in violation of fundamental rules of International law’ is **crime against humanity**;
 - c. Article 8 of Rome Statute declares ‘inhuman treatment’, ‘suffering’ and ‘unlawful confinement’ as **war crimes**.
- 7) The British courts have laid down strict tests to regulate power to arrest:
 - a. *actual belief* that the arrest was **necessary** and *belief shall be objectively reasonable*;
 - b. necessity to be based on situation of the victim, nature and circumstances of the offence; can objectives of the investigation be met by *less intrusive means or alternative means., and proportionate manner which is compatible with the right to liberty*.
- 8) In India, the superior Courts and Police Commissions have tried to circumscribe the vast discretionary arrest power of Police by laying down numerous guidelines to balance *individual rights and liberties, and individual duties and responsibilities declaring that arrest and detention of a person can cause incalculable harm to the reputation and self-esteem of a person*.
- 9) In Pakistan, section 54 of CrPC, The Police Rules and case law provide guidelines to the arresting officers requiring them not to unnecessarily

interfere with the liberty of suspects ‘*until the investigation is sufficiently complete*’ and ‘*the facts justify arrest*’.

- 10) NAO takes away at least 09 **normally** inbuilt safeguards/interim reliefs with references to arrest under CrPC; hence, powers of NAB needs to be *exercised with greatest possible due care and diligence, and greatest circumscription* as ‘where there is great power, there is great responsibility’.
- 11) The NAO denies the right to bail; however, the honourable Lahore High Court in *writ* jurisdiction granted bail in **Anwar Saifullah Khan case** on the principle of ‘*ubi jus ibi remedium*’. Article 10-A is added in the Constitution and Pakistan has ratified the ICCPR and CAT. It is common experience that person arrested by NAB are acquitted after years (Moeen Aftab of PSM). It is, therefore, high time that the constitutional courts lay down strict guidelines about necessity and reasonableness of the arrest orders. This will be the logical next step of the *Anwar Saifullah case* .
- 12) If a constitution court finds that the arrest is illegal, unlawful and arbitrary, then the honorable court may exercise the *Writ of Habeas Corpus* and the *Writ of the Certiorari* to release accused from the detention without any bail while he may continue facing trial.
- 13) If it is declared that an arrest is illegal, unlawful or arbitrary, then the court can also indicate/guide that an accused person has the right to sue for damages under malicious prosecution or false imprisonment.
- 14) The constitutional courts can impose constitutional torts in cases of false imprisonment on the Indian model and it will provide much required checks on the NAB to carry out actions with a reasonable duty to care.
- 15) Detailed Guidelines are proposed to be adopted by the NAB or declared by the Court.

Humanizing the Power to Arrest

NAB's Arrest in the Context of Human Rights

1. Introduction

16) Mankind has certain inalienable rights and, at the same time, State has the right to arrest an accused to protect the society from the delinquents. How to strike a balance between these two competing principles has attained more significance in the post-WWII era after the emergence of many international and regional instruments of the human rights that are binding on the State Parties and subsequent national constitutional guaranties for civil liberties.

17) The power to arrest cannot be an absolute power; hence, it is the subject of all the major human rights milestones in the history.

18) *Magna Carta Libertatum* ('The Great Charter of the Liberties'), commonly called *Magna Carta* (1215 declares:

'No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.'

19) Thereafter, another great milestone in the history of England called the Petition of Rights (1628), initiated by Sir Edward Coke after dismissal from the Bench, referring to the *Magna Carta* declared:

'III. And whereas also by the statute called 'The Great Charter of the Liberties of England,' it is declared and enacted, that no freeman may be taken or imprisoned or be disseized of his freehold or liberties, or his

free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land’.

20) The Bill of Rights (1688) also acknowledged that ‘*excessive bail ought not to be required nor excessive fines imposed **nor cruel and unusual punishments inflicted***’.

21) The US Constitution (1789) borrowed from the Bill of Rights the principle of *Habeas Corpus* into Article 1, Section 9 of US Constitution, followed by the Eighth Amendment in the Constitution.

22) The French Declaration of the Rights of Man and of the Citizen (1789) declares:

*‘Article VII – **No man can be accused, arrested** nor detained but in the cases determined by the law, and according to the forms which it has prescribed.*

*Article IX – Any man being **presumed innocent** until he is declared culpable if it is **judged indispensable to arrest him**, any rigor which, **would not be necessary** for the securing of his person must be severely reprimanded by the law’.*

23) Now the Universal Declaration of Human Rights (1948) (UDHR) and International Covenant on Civil and Political Rights (1966) (ICCPR) have further developed safeguards from the arrest. It is highlighted that Pakistan has ratified the ICCPR and is responsible to enforce it and report to the UN Human Rights Committee.

24) The courts all over the world have tried to delineate the power and discretion to arrest and are constantly developing and setting out stringent tests as to the reasonability and necessity of the arrest.

25) It is high time that the constitutional courts of Pakistan entrusted with guarding and protecting the Fundamental Rights of the people enshrined in the Constitution, 1973, shall rise to the occasion to strike a new balance in the light of emerging universal jurisprudence and the ouster clauses of the right to seek bail in National Accountability Ordinance, 1999 (NAO).

2. Arrest and Bail in Criminal Law

The *corpus* of criminal law in Pakistan confers on State a right to arrest and grants powers to the courts to grant bail:

1) Section 54 of the Code of Criminal Procedure, 1998, (CrPC) says:

‘When police may arrest without warrant. (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest:

*Firstly, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a **reasonable suspicion exists** of his having been so concerned;.....*

2) Section 497 of CrPC gives powers to grant bail:

‘When bail may be taken in cases of non-bailable offence. (1) When any person accused of non- bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court, he may be released on bail.....

3) Similarly, section 498 CrPC grants power to grant bail before arrest.

4) The Article 24 of the NAO gives the Chairman NAB un-guided power to arrest:

‘The Chairman NAB shall have the power, at any stage of the investigation under this Ordinance, to direct that the accused, if not already arrested, shall be arrested.’

- 5) However, in contrast to normal criminal law that allows even murderers and terrorist to seek bail, the NAO denies the accused persons under the NAO the right of bail from any court. The Article 9 (b) of the NAO reads:

‘All offences under this Ordinance shall be non-bailable and, notwithstanding anything contained in sections 497, 498 and 561A or any other provision of the Code, or any other law for the time being in force, no Court shall have jurisdiction to grant bail to any person accused of any offence under this Ordinance’.

3. Human Rights Guarantees

On the one hand, the Constitution of Pakistan, various binding international human rights instruments and provisions of Islam confer on mankind various inalienable rights (right to life, liberty, security of person and dignity) and on the other hand, the NAO has unlimited powers to arrest and denies bail that is otherwise available even in the most heinous offence i.e. homicide. These contrary provisions need to be harmonized and interpreted so as to protect the binding and overriding Fundamental Rights. Let us enumerate in summary various provisions ensuring various human rights:

15) Elimination of Exploitation

The Article 3 of Constitution of Pakistan, 1973, reads:

'Elimination of exploitation. -The State shall ensure the elimination of all forms of exploitation (arrest can be one of the worst form of exploitation).

16)Due process of law

(a) Article 4 of Constitution of Pakistan, 1973, reads:

'Right of individuals to be dealt with in accordance with law, etc.-(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Pakistan.

(2) In particular-

(a) No action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;.....

(b) Article 7 of UDHR declares:

'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.

17)Security of Person

(a) Article 9 of Constitution of Pakistan, 1973 declares:

‘Security of person. -No person shall be deprived of life or liberty save in accordance with law’.

(b) Article 3 of the UDHR says:

*“Everyone has the right to life, liberty and the **security of person**’.*

(c) The ICCPR declares:

(i) *Article 6: 1. Every human being has the **inherent right to life**. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

(ii) *Article 9: 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

(d) Article 5 (Right to liberty and security) of European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR) says:

*1. ‘Everyone has the **right to liberty and security of person**. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:.....*

*2. Everyone who is arrested shall be informed promptly, in a language, which he understands, of the **reasons for his arrest** and of any charge against him.*

4. *Everyone who is deprived of his liberty by arrest or detention shall be entitled to **take proceedings** by which the lawfulness of his detention shall be decided speedily by a court and **his release ordered if the detention is not lawful.***

5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable **right to compensation**'.*

(e) 'Right to Life' is interpreted in a broader context:

(i) In **Ms. Shehla Zia v Wapda**, PLD 1994 SC 693, it was declared that the word 'life' is very significant as it covers all facts of human existence: *'the word **life**' has not been defined in the Constitution but it does not mean nor can be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally'.*

(ii) In **Kharak Singh v. State of U.P.** [AIR 1963 SC 1295] it was held that the term "life" indicates ***something more than mere animal existence.** The inhibitions contained in Article 21 against its deprivation extend even to those faculties by which life is enjoyed.*

(iii) In **Bandhua Mukti Morcha v. Union of India** [AIR 1984 SC 802] it was held that the right to life under Article 21 means the ***right to live with dignity, free from exploitation.***

(f) The Human Rights Committee of the UN in its 112th session while giving its General Comments No. 35 on Article 9 (Liberty and security of person) of the ICCPR (Pakistan has ratified it and it is bound by it) declared:

*‘Article 9 recognizes and protects both liberty of person and security of person. Liberty of person concerns freedom from confinement of the body, not a general freedom of action. **Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity.***

(https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11)

4) Right to A Fair Trial

(a) Article 10A of the Constitution of Pakistan, 1973, (newly added) reads:

‘Right to fair trial.—For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process’.

(b) Article 10 of the UDHR says:

‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him’.

(c) Article 15 of the ICCPR reads:

*‘Article 9: 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. **It shall not be the general rule that persons awaiting***

trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take **proceedings** before a court, in order that that court may decide without delay **on the lawfulness of his detention** and order his release if the detention is not lawful.*

5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable **right to compensation**'.*

5) Freedom of Movement

Freedom of movement is guaranteed in:

(a) Article 15 of the Constitution of Pakistan, 1973, reads:

Freedom of movement, etc.- Every citizen shall have the right to remain in, and, subject, to any reasonable restriction imposed by law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof.

(b) Article 13 of UDHR reads:

1. *'Everyone has the right to freedom of movement and residence within the borders of each State.*
2. *Everyone has the right to leave any country, including his own, and to return to his country'.*

6) Presumption of Innocence

- (a) In the ninth century, King Alfred the Great of England is said to have propagated a one-to-one rule in a case where the judge was hanged for

convicting an innocent person. Chief Justice John Fortescue, on the other hand, applied a twenty-to-one rule in 1471. Two hundred years later, Matthew Hale, known for Hale's *Pleas of the Crown*, wrote that the ratio is five-to-one where crimes are concerned which carry a death sentence. And around 1760, Blackstone came up with his ten-to-one rule: '*It is better that ten guilty persons escape than that one innocent suffer*'. (William Blackstone, *Commentaries on the Laws of England*, 1760s)

- (b) Outside the UK too, we find the Blackstone ratio linked to the presumption of innocence. The rule spread to the territories, which were part of the British Empire : Canada, Australia, Indian Sub-continent, US etc.
- (c) The presumption of innocence has a limiting rule in connection with pre-trial detention. The presumption of innocence encompasses the right to be treated as an innocent person. This means that no punishment is to be undergone before conviction and that coercive measures are to be used with restraint. Beccaria's *Dei delitti e delle pene* (1764) is the source of this interpretation. He related the effect of the principle to pre-trial detention and torture.
- (d) Many international and regional human rights instruments enshrine this doctrine based on natural justice:
 - i. Article 11 of the UDHR: '*Everyone charged with a penal offence has the **right to be presumed innocent** until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence*'.

ii. Article 14 of the ICCPR: ‘Everyone charged with a criminal offence shall have the **right to be presumed innocent** until proved guilty according to law’.

iii. Article 6 of European Convention of Human Rights (ECHR):
‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’.

(e) The principle of the presumption of innocence is applicable in Islamic criminal jurisprudence. Hazrat Aisha (the wife of the Prophet) reported that the Prophet said: *“Avoid condemning the Muslim to Hudud whenever you can, and when you can find a way out for the Muslim, then release him for it. **If the Imam errs, it is better that he errs in favor of innocence than in favor of guilt (punishment).**”* (Al Tirmizy, No. 1424; Al Hakim, No. 4384)

(f) Article 19 of OIC’s Cairo Declaration on Human Rights in Islam says:

(e) A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.

(g) The presumption of innocence has long been regarded as fundamental to protecting accused persons from wrongful conviction. The basic principle is that the accused is to be considered innocent until proven guilty of a criminal offence. The reason why this principle is considered fundamental is that it is generally seen as better for the guilty to go free than the innocent be convicted. This is an erroneous way of expressing the idea that a defendant ought only to be convicted of a criminal offence if it is known that he is guilty of that offence.

- h) The European Court of Human Rights first discussed the concept in **Salabiako** but did not elaborate as what would the substantive content of Article 6 (2) of the European Convention of Human Rights (ECHR) outlining presumption of innocence and it left a vague test which requires that Member States confine presumptions of fact and law *‘within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.’* (**Salabiako v France (1988) 13 EHRR 379**)
- i) However, this ‘reasonable limits’ test has been taken by the courts of England and Wales to require a balancing exercise between the egregiousness of the evil against which the law is intended to protect and the due process rights of the accused person. This balancing test was first articulated by Lord Hope in his seminal judgment in **Kebilene**: *‘As a matter of general principle a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individuals’.* (**R v Director of Public Prosecutions, Ex p Kebilene [2000]2AC326,384**)
- j) Since **Kebilene**, the application of this balancing test to Article 6(2) has been further developed in both English and Scots law, with the most extensive development by the House of Lords in **R v Lambert**. In that case, the Court outlined the way in which article 6(2) claims ought to be structured by responding to four questions: Now the courts while interpreting legislations about arrest and detention say:

- (i) The first question it addressed was whether a shift in the burden of proof in fact **interferes with the presumption of innocence**.
- (ii) If that question is answered in the affirmative, the second question is whether there is a **justification for some interference** with the presumption of innocence.
- (iii) If the answer to the second question is also affirmative, the third question is whether that **interference is proportionate**.
- (iv) If the answer to the third question is in the negative, the fourth question is whether the provision can be **‘read down’** in such a way as to make it compatible with Article 6 (2) of ECHR (that quarantines presumption of innocence). **R v Lambert [2001] UKHL 37 at 156 per Lord Clyde**. (For further details see: ‘The Presumption of Innocence and the Human Rights Act, Victor Tadros and Stephen Tierney, 404-405, The Modern Law Review Limited, 2004’)

7) Right to Dignity

- (a) Islam lays greatest possible emphasis on right to dignity and declares it as an inherent right. The Quran says:

‘Verily we have honoured the Children of Adam’. (17:70)

- (b) A man from the people of Egypt came to ‘Umar ibn Al-Khattab and said, ‘O leader of the believers, I seek refuge in you from injustice!’ ‘Umar replied, ‘You have sought someone willing’. The man said, ‘I competed with the son of Amr-ibn-Al-‘As and I won, but he started striking me with a whip and saying: ‘I am the son of the dignified!’ Upon this, ‘Umar wrote to Amr ordering him to travel to him with his son. He came with

his son and ‘Umar said, ‘Where is the Egyptian?’ He gave him the whip and told him to strike the son of Amr. The man started striking him. Then ‘Umar said to the Egyptian, ‘Direct it to Amr’. The Egyptian said, ‘O leader of the believers, it was only his son who struck me and I have settled the score’. ‘Umar said to Amr, ‘*Since when did you enslave the people though they were born from their mothers in freedom?*’ Amr said, ‘O leader of the believers, I did not know about this and he did not tell me’. (Ibn Abdil Hakam, Futuh-ul- Misr, page 290)

- (c) In the Western tradition, the concept of *dignitas hominis* in classical Roman thought largely meant ‘status’. Honour and respect should be accorded to someone who was worthy of that honour and respect because of a particular status that he or she had. So, appointment to particular public offices brought with it *dignitas*.
- (d) During the Middle Ages, the idea of *dignitas* came to be used as the way of distinguishing between Man and other creatures. The humanists attempted to reconcile classical thought and dogmatic theology by emphasizing the idea of mankind as having dignity because Man is made in the image of God, distinguishing Man from other species.
- (e) The Catechism of the Catholic Church incorporates this idea of Man as made in the image of God as central to its conception of human dignity.
- (f) The subsequent development of dignity drew substantially on the importance of Man as having the capacity of reason, while dropping the religious elements of humanist writings. Then there is ‘*the central existential claim of modernity – man’s autonomy, his capacity to be lord of his fate and the shaper of his future*’.

- (g) In the Enlightenment, the dignity of Man in this sense was developed philosophically by Immanuel Kant and has become the best-known source for the subsequent belief that *'individuals should be treated as ends and not simply as means to an end'*. (Kant, 'Metaphysics of Morals', Section 38 of the Doctrine of Virtue)
- (h) Political philosophy from a somewhat different tradition, however, contributed to the popularization of dignity, as it became closely connected with the growth of republicanism and democracy. (For details see: **'Human Dignity and Judicial Interpretation of Human Rights, Christopher McCrudden, The European Journal of International Law, Vol. 19 no. 4, 2008)**
- (i) The concept of dignity is foundational to modern international human rights law. By agreeing to the Charter of the United Nations (UN Charter), Member States *'reaffirm their faith in . . . the dignity and worth of the human person'*. It was the repeated and gross violation of human dignity during World War II that provided the impetus for the creation of the United Nations and the development of subsequent global human rights treaties. Human rights can, therefore, be considered as specific descriptions of what human dignity entails.
- (j) Article 14 of Constitution of Pakistan, 1973 declares:
Article 14: Inviolability of dignity of man, etc.—(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

(k) The UDHR is the foundation of modern international human rights law.

Within the Preamble of the UDHR, '*inherent dignity*' is referred to as foundation of 'freedom, justice and peace'. The concept of dignity is also referred to in specific Articles of the UDHR: Article 1 asserts that 'all human beings are born free and equal in dignity and rights'; Article 22 declares that 'economic, social and cultural rights' are indispensable for human dignity. Further, Article 23 establishes a right to remuneration for work to ensure 'an existence worthy of human dignity'.

(l) The ICCPR and ICESCR (International Covenant on Economic, Social and Cultural Rights) also make significant reference to dignity. The preambles of both Conventions claim that recognition of 'the inherent dignity and . . . rights' of human beings 'is the foundation of freedom, justice and peace in the world'. Similarly, both preambles assert that 'human rights derive from the inherent dignity of the human person'. The ICCPR also references dignity in Article 10, which states that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.. Similarly, in ICESCR, States Parties agree that 'education shall be directed to the full development of the human personality and the sense of its dignity'.

(m) Reference to human dignity is also found in other key international human rights treaties. The International Convention on Elimination of All Forms of Racial Discrimination (ICERD) is premised on the respect for human dignity manifested in the UN Charter, UDHR etc. Similarly, CEDAW references human dignity in the UN Charter and UDHR and asserts that 'discrimination against women violates the principles of...human dignity'. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognizes that human

rights ‘derive from the inherent dignity of the human person’. Further, the Convention on the Rights of the Child makes numerous references to human dignity, which extends to the child (Articles 23(1), 28(2), 37(c), 39, 40 (1). The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention for the Protection of All Persons from Enforced Disappearance also make reference to human dignity.

- (n) The phrase ‘human dignity’ suggests that there is something inherent in human beings, which warrants honour and respect. When one speaks about offending somebody’s *dignity, he tend to refer to words or actions that cause another extreme embarrassment, humiliation, or discomfort that would be considered disrespectful.*

(For details see: **Jane Kotzmann and Cassandra Seery, ‘Dignity in International Human Rights Law: Potential Applicability in Relation to International Recognition of Animal Rights’, Michigan State International Law Review, Vol. 26.1, 2017)**

- (o) The UDHR and other instruments innumerate almost 30 human rights and all so enumerated rights are not absolute and are qualified except *right to dignity that is absolute and unqualified.* The Constitution of Pakistan follows same pattern.
- (p) In the European context, interpretations of the European Commission and Court of Human Rights, particularly of the Article 3 of the ECHR about prohibition of torture and inhuman and degrading treatment and punishment, have drawn extensively on the concept of human dignity as a

basis for their decisions. (**East African Asians v. United Kingdom**, 3 EHRR (1981) 76, at paras 203–207); **Tyrer v United Kingdom**, 2 EHRR 1, at para. 33; **Bock v. Germany**, 12 EHRR (1990) 247, at para. 48; **SW v. UK**; **CR v. UK**, 21 EHRR (1995) 363, at para. 44; **Ribitsch v. Austria**, 21 EHRR (1995) 573, at para. 38; **Goodwin v. United Kingdom**, 35 EHRR (2002) 447 at paras 90–91; **Pretty v. United Kingdom**, 24 EHRR (1997) 423, at para. 65)

(q) Human dignity has also been incorporated judicially as a general principle of European Community law, deriving from the constitutional traditions common to Member States. Advocate General of the European Court of Justice Dr. Jacobs stated in 1993, ‘*the constitutional traditions of the Member States in general allow for the conclusion that there exists a principle according to which the State must respect not only the individual’s physical well-being, but also his dignity, moral integrity and sense of personal identity*’ (**Case C–168/91, Christos Konstantinidis [1993] ECR I–1191**, at para. 39 of the AG’s Opinion)

(r) Judges in the Common Law tradition have become prominent in the spreading of dignity. The UK House of Lords, for example, had used the concept of human dignity. (**Ghaidan v. Godin Mendoza [2004] 2 AC 557**, at 604, para. 130 (Baroness Hale); **R v. Secretary of State for Work and Pensions, ex parte Carson [2005] UKHL 37**, at para. 49 (Lord Walker))

4. Arrest and Human Rights: UN Approach

Various international institutions and the courts have tried to contextualize the power to arrest in the light of basic human rights.

(1) The UN has developed a Manual for Police indicating as how liberty can be balanced with power to arrest and detain after arrest. It says:

- a. Arrest: *‘Everyone has the right to liberty and security of the person and to freedom of movement. **No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.***
- b. Detention: *‘**pre-trial detention shall be the exception**, rather than the rule’.* (**Human Rights Standard and Practice For the Police - UNITED NATIONS, New York and Geneva, 2004**)

(2) UN General Assembly has also developed Code of Conduct for Law Enforcement Officials. It says:

*Article 2: In the performance of their duty, law enforcement officials shall respect and **protect human dignity** and maintain and uphold the human rights of all persons.* (**Code of Conduct for Law Enforcement Officials adopted by General Assembly Resolution 34/169 of 17 December 1979**)

5. What is Arbitrary Detention?

- 1) Arbitrary detention is the violation of the right to liberty. It is **defined as** *the arrest and deprivation of liberty of a person outside of the confines of nationally recognized laws or international standards.*
- 2) Detention may be illegal without being arbitrary and vice-versa. Illegality simply means that the law has not been complied with, whereas **arbitrary**

refers to the inappropriate, unjust, unforeseeable or disproportionate nature of the detention.

3) The right to personal liberty is defined by Article 9 of the ICCPR which outlines the conditions that render detention arbitrary, especially when:

- a) The grounds for the arrest are illegal;
- b) The victim was ***not informed of the reasons for the arrest***;
- c) The ***procedural rights*** of the victim were not respected;
- d) The victim was not brought before a judge within a reasonable amount of time.

4) UN Standards for Peacekeeping by Police say:

*‘Prohibition of arbitrary arrest and detention: deprivation of liberty is an extremely serious matter and can be justified only when it is **both lawful and necessary**. No one can be deprived of his/her liberty without legal reason or process, by an act of Government or with its complicity, tolerance or consent. What is an arbitrary arrest?*

- a. Not based on legal grounds;*
- b. Not respecting legal procedures;*
- c. Not reasonable/appropriate in the circumstances;*
- d. Not proportional to the legal objectives;*
- e. Discriminatory;*
- f. Without fair, solid and substantial cause;*
- g. Unduly intrusive vis-à-vis other rights.*

(UN Peacekeeping PDT Standards, Specialized Training Material for Police, 1st edition 2009 at page 8)

- 5) The Human Rights Committee of the UN in its 112th session while giving its General Comments No. 35 on Article 9 (Liberty and security of person) of the ICCPR declared:

*‘Article 9 recognizes and protects both liberty of person and security of person. Liberty of person concerns freedom from confinement of the body, not a general freedom of action. **Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity.** Arrest or detention that lacks any legal basis is also arbitrary. An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. **The notion of ‘arbitrariness’ is not to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality’.***
 (https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11)

- 6) Article 7 of Rome Statute of the International Criminal Court declares that ‘imprisonment in violation of fundamental rules of International law’ is **crime against humanity**:

‘For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) *Enslavement;*

(d) *Deportation or forcible transfer of population;*

(e) ***Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.***

- 7) Article 8 of Rome Statute of the International Criminal Court declares ‘inhuman treatment’, ‘suffering’ and ‘unlawful confinement’ as **war crimes**.

‘For the purpose of this Statute, ‘war crimes’ means:

(a) *Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:*

(i) *Willful killing;*

(ii) *Torture or **inhuman treatment**, including biological experiments;*

(iii) *Willfully causing great **suffering**, or serious injury to body or health;*

(iv) *Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*

(v) *Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;*

(vi) *Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;*

(vii) *Unlawful deportation or transfer **or unlawful confinement**;*

(viii) *Taking of hostages.*

6. Arrest and Human rights in UK

The British courts (Common Law) consider the exercise of the ‘power of arrest’ a significant interference with right to liberty. If a person is detained unlawfully it is considered a trespass constituting false imprisonment. The lawfulness of an arrest is based on strict statutory criteria and tests developed by the courts.

1) Initially, there was a two-stage test, requiring a determination of:

- a) Whether the offence was serious enough to be an arrestable offence?;
- and
- b) Whether it was a reasonable belief to arrest?.

(Al Fayed v Metropolitan Police Comr [2004] EWCA Civ 1579, [2004] All ER (D) 391 (Nov))

- c) The test for reasonableness was from the *Wednesbury unreasonableness* test: A reasoning or decision is *Wednesbury* unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it (**Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223**)

2) This test was changed and the Court of Appeal set down a two-stage test for determining whether an arrest had been necessary:

(i) Did the arresting officer *actually believe* that the arrest was **necessary** for an identified reason?

(ii) If yes, was that *belief objectively reasonable*?

(Hayes v Chief Constable of Merseyside Constabulary [2011] EWCA Civ 911)

3) In Parker, the Court of Appeal ‘amplified and adjusted’ the relevant questions which must be answered, as follows:

(a) Did the arresting officer suspect that an *offence had been committed*?

The answer to this question depends entirely on the findings of fact as to the officer’s state of mind;

(b) Assuming the officer had the necessary suspicion, did the arresting officer have *reasonable grounds for that suspicion*? This is a purely objective requirement to be determined by the Court;

(c) Did the arresting officer *suspect* that the person who was arrested *was guilty of the offence*? The answer to this question depends entirely on the findings of fact as to the officer’s state of mind;

(d) Assuming the officer had the necessary suspicion, did the arresting officer have *reasonable grounds for that suspicion*? This is a purely objective requirement to be determined by the Court;

- (e) The Court should then consider whether, on the facts, the arresting officer believed that it was *necessary to arrest* the person in question. If yes, then the reasonableness of that belief must be assessed objectively.

(Parker v Chief Constable of Essex Police [2018] EWCA Civ 2788 at [115]; (Parker v Chief Constable of Essex Police [2017] EWHC 2140 (QB) at [14]

4) The *necessity criteria* is set out in PACE CODE-Code G:

- (a) An officer, when considering necessity, should take into account:

- (i) The situation of the victim;
- (ii) The nature of the offence;
- (iii) The circumstances of the offence; and
- (iv) The needs of the investigation.

- (b) Code G is explicit that an officer must consider if their objectives can be met by *less intrusive means*, and that when the power of arrest is exercised it is essential that it is *exercised in a non-discriminatory and proportionate manner which is compatible with the right to liberty*.

- (c) This comes with a warning that the exercise of the power of arrest without justification may lead to civil claims against the police and could lead to challenges to any subsequent proceedings. **(PACE CODE G: REVISED CODE OF PRACTICE FOR THE STATUTORY POWER OF ARREST BY POLICE OFFICERS, Paragraph 2.8 and 1.3)**

(d) The Court found that the officer must evaluate the feasibility of achieving the object of the arrest by *alternative means*.

(Re Alexander's applications for Judicial Review [2009] NIQB 20)

(e) An arrest had been unlawful and unnecessary and awarded damages against the police where the arrest did not and '*was never going to have*' any impact on the prompt and effective investigation. **(Lord Hanningfield v Chief Constable of Essex Police [2013] EWHC 243 (QB))**

8. Arrest and Human Rights in India

1) The effort of the superior Courts and Police Commission of India, and in particular of the Supreme Court over the last more than three decades has been to circumscribe the vast discretionary power vested by law in Police by imposing several safeguards and to regulate it by laying down numerous guidelines and by subjecting the said power to several conditionalities. The effort throughout has been to prevent its abuse while leaving it free to discharge the functions entrusted to the Police.

2) The Supreme Court of India made certain observations in the judgment in **Smt. Nandini Satpathy v. P.L. Dani AIR 1978 SC 1025** at page 1032 has earlier said:

'To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at

the hands of the law-enforcement machinery on the other is a perennial problem of statecraft’.

3) In **Joginder Kumar v. State of U.P. (AIR 1994 SC 1349)** the Indian Supreme Court declared:

*‘The **horizon of human rights is expanding**. At the same time, the crime rate is also increasing. Of late, this court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two?*

*A realistic approach should be made in this direction. **The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other**; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively;....*

The quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of criminal law.

*‘No arrest can be made because it is lawful for the police officer to do so. **The existence of the power to arrest is one thing. The justification for the exercise of it is quite another.** The police officer must be able to justify the arrest apart from his power to do so. **Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self -esteem of a person.** No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of*

a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter'.

4) The National Police Commission of India in its Third Report (1980) referring to the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The Report suggested that, by and large, ***nearly 60% of the arrests were either unnecessary or unjustified*** and that such ***unjustified police action accounted for 43.2% of the expenditure of the jails.***

5) The National Police Commission of India in its Third Report at page 32 also suggested:

'An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

*(b) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is **necessary to arrest** the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims.*

(c) The accused is likely to abscond and evade the processes of law.

(d) The accused is given to violent behavior and is likely to commit further offences unless his movements are brought under restraint.

(e) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

6) **Ajeet Singh Alias Muraha vs State of Uttar Pradesh** And Ors. 2001 CriLJ 634 affirmed the Jogindar Kumar.

- 7) In **Arnesh Kumar v. State of Bihar** (2014) 8 SCC 273, the Court laid down this test:

*‘The police officer before arrest must put a question to himself, **why arrest? Is it really required? What purpose it will serve? What object it will achieve?** It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest need to be exercised.*

***Arrest brings humiliation, curtails freedom and casts scars forever.** Lawmakers know it so also the police....it seems that police has not learnt its lesson..... It has not come out of its **colonial image** despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public.*

- 8) In an recent judgment, **Shadab Ali vs State Of U.P.** Thru. Home Secy. Lko. ... on 1 October, 2019 it is held:

*‘6. Law Commissions, Police Commissions and this Court in a large number of judgments emphasized the **need to maintain a balance between individual liberty and societal order while exercising the power of arrest.** Police officers make arrest as they believe that they possess the power to do so. **As the arrest curtails freedom, brings humiliation and casts scars forever,** we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able **to justify the reasons thereof**’.*

*Ultimately, the Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, [Section 41](#) of the Code of Criminal Procedure, in the present form came to be enacted.....The value of the **proportionality permeates the amendment relating to arrest**'.*

9) The referred section 41 CrPC is reproduced here for ready reference:

‘41. When police may arrest without warrant. (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person--

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a **reasonable complaint** has been made, or credible information has been received, or a **reasonable suspicion** exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:--

(i) the police officer has **reason to believe** on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such **arrest is necessary**--

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to

dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing..'

9. Arrest and Human Rights in Pakistan

1) Section 54 of the Code of Criminal Procedure, 1998, gives to the Police powers to arrest without a warrant from a Magistrate in certain conditions. The section reads:

'When police may arrest without warrant. (1) Any police-officer may, without an order from a

Magistrate and without a warrant, arrest:

*Firstly, any person who has been concerned in any cognizable offence or against whom a **reasonable complaint** has been made or credible information has been received, or a **reasonable suspicion** exists of his having been so concerned.....;*

2) The Police Rules 26. 2 and 26.9 also provide guidelines to the police officers involved in investigation of crimes requiring them not to unnecessarily interfere with the liberty of suspects '***until the investigation is sufficiently complete'' and 'the facts justify arrest'***.'

Pakistan court have also tried to define the legality of the arrest made by Police under section 54 of CrPC:

- 3) In **Muhammad Shafi v. Muhammad Boota** and another [PLD 1975 Lahore 729], the honourable Lahore High Court had observed that:

*"The words **'reasonable suspicion'** (in section 54, Cr.P.C.) do not mean a mere vague surmise, but a **bona fide belief** on the part of the Police Officer that an offence has been committed or is about to be committed. Such belief has to be founded on some definite averments tending to show suspicion on the person arrested.--- The action of a police Officer under section 54, Cr.P.C. must be guarded inasmuch as he should **first satisfy himself about the credibility of the information** which, as stated already, should relate to definite facts. It was not at all the intention of the law-giver that the Police Officer should at his own sweet will arrest anybody he likes, although he may be a peace-loving citizen of the country."*

- 4) In **Mst. Razia Pervez and another v. The Senior Superintendent of Police, Multan and 5 others** [1992 P.Cr.L.J. 131] the honourable Lahore High Court had observed as follows:

*'No doubt, the Police Officer can arrest a person where a reasonable suspicion exists of his having been concerned in any cognizable offence but **power given to the Police Officer under this section (section 54, Cr.P.C.) being an encroachment on the liberty of a citizen is not unlimited.** It is subject to the condition stated therein. An arrest purporting to be under this section **would be illegal** unless the circumstances specified in the various clauses of the section exist.*

- 5) In **Khizar Hayat Vs I.G. Police**, Lahore [P L D 2005 Lahore 470] the honourable Lahore High Court dilated upon the subject in detail:

*'As the powers mentioned above given to the Police Officers under section 54, Cr.P.C. encroaches upon the liberty of a person, this wide power has to be construed, interpreted and defined strictly. A general definition of what constitutes reasonableness in a complaint or suspicion and credibility of information cannot be given. Both must depend upon the existence of tangible legal evidence within the cognizance of the Police Officer and, he must judge **whether the evidence is sufficient to establish the reasonableness and credibility of the charge**, information or suspicion. It has been laid down by this Court in 1992 PCr.L J 131: **An arrest which is beyond the provisions of section 54, Cr.P.C. would be illegal and void per se**.'*"

- 6) In **Sughra Bibi PLD 2018 SC 597**, it is held:

'Ordinarily no person was to be arrested straightaway only because he had been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer felt satisfied that sufficient justification existed for his arrest---For such justification guidance was found in the relevant provisions of the Code of Criminal Procedure, 1898 and the Police Rules, 1934---Suspect was not to be arrested straightaway or as a matter of course and, unless the situation on the ground so warranted, the arrest was to be deferred till such time that sufficient material or evidence became available on the record of investigation prima facie satisfying the investigating officer regarding correctness of

the allegations levelled against such suspect or regarding his involvement in the crime in issue.

10. More Power more Responsibilities

- 1) In the French National Convention (1793), there is this sentence: ‘They [the Representatives] must contemplate that *a great responsibility is the inseparable result of a great power*’. In 1906, Winston Churchill said, ‘Where there is great power there is great responsibility’. When with great power comes great responsibility, then there shall a structured discretion to use it.
- 2) Normal law of the land dealing with the arrest (CrPC) has some inbuilt safeguards to structure power to arrest and it has also some external safeguards and interim reliefs.
- 3) The National Accountability Bureau Ordinance 1999 (NAO) is a special law that takes away many of the safeguard and interim reliefs that an accused can have on the allegation of normal offences under normal criminal laws, including the most heinous offence that is murder. The following **09 (nine)** safeguards and interim reliefs are available to the accused in normal offence including murder and terrorism:
 - (i) A Magistrate can discharge any arrested person (**63 CrPC**);
 - (ii) Police may not investigate further if it appears that there is no sufficient ground for further investigation (**157 CrPC**);
 - (iii) Release of arrested person during investigation when evidence is deficient (**169 CrPC**)

- (iv) Release of the arrested person at the time of framing of Charge when a Judge thinks that no case is made out (**265-D CrPC**);
- (v) Pre-arrest bail by the Sessions Court (**498 CrPC**);
- (vi) Pre-arrest bail by the High Court (**498 CrPC**);
- (vii) Post-arrest bail by the Sessions Court (**497 CrPC**)
- (viii) Post-arrest bail by the High Court (**497 CrPC**)
- (ix) Power of the High Court to release a person (**561-A CrPC**)

4) On the contrary, all such safeguards/ interim reliefs are not available (in law or in practice) to an accused under NAO. It means that the power of arrest of the Chairman of NAB (Section 24 NAO) shall *be exercised with greatest possible due diligence, circumscription and greatest care* and shall be properly structured in the light of constitutional Fundamental Rights, International binding and reportable human rights obligations, relevant international and national jurisprudence, golden principles of Islam and the non-availability of the interim relief / safeguards.

11. Next Step after Anwar Saifullah Case

- 1) Article 9 of the NAO denies the right to bail of any accused under NAO. However, the honourable Lahore High Court while exercising extraordinary constitutional writ jurisdiction granted bail in **Anwar Saifullah Khan Vs State** and Others (P L D 2000 Lahore 564) on the grounds of a principle of Law of Torts i.e. '*ubi jus ibi remedium*' (where there is wrong, there is remedy):
- 2) It is common experience that NAB arrests an accused person, he is incarcerated, trial takes ages and then he is acquitted; one case is of ex-

Chairman Pakistan Steel, Mr. Moeen Aftab who was arrested by NAB, was in jail for 2 years and then was acquitted after 7 years trial).

3) The 18th Amendment has inserted Article 10-A in the Constitution and Pakistan has ratified the ICCPR and Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in 2010 under which Pakistan submits Periodic Reports to the UN Committee on Human Rights, the Reports are examined by the Committee and comments made thereupon.

4) It is, therefore, high time that the constitutional courts being guardian of the Fundamental Rights look into question of necessity and reasonableness of the arrest orders issued by the Chairman NAB under Article 24 of the NAO. This will be the logical next step of the *Anwar Saifullah case* .

5) If a constitution court finds that the arrest is illegal, unlawful and arbitrary, then the honorable court may exercise the *Writ of Habeas Corpus* and shall order the release of the accused or the Court may exercise the *Writ of the Certiorari* to cancel the arrest order of the Chairman NAB.

6) The logical consequences of the exercise of the *Writ of Habeas Corpus* or *Certiorari* shall be that the accused will be released from the detention without any bail but he may continue facing trial.

7) If it is declared that an arrest is illegal, unlawful or arbitrary, then the court also indicate that an accused person has the right to sue for damages under malicious prosecution or false imprisonment as stated in *Niaz and Others Vs Abdul Sattar and Others [P L D 2006 SC 432]*

‘By Article 4 of the Constitution, it is the inalienable right of every citizen to enjoy the protection of law and to be treated in accordance with law and in particular no action detrimental to the life, and, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 14 of the Constitution also guarantees the dignity of man and subject to law, the privacy of home. In the context of the Constitution, it is no more necessary to hedge in an action for damages for malicious prosecution by the condition that the action was an abuse of the "process of the Court". It will be more in consonance with the genesis of the Constitution, Articles 4 and 14 in particular, to say that the foundation of the action for damages for malicious prosecution lies, not in the abuse of the process of Court, but in the abuse in the process of law.One of the modes to achieve this goal is to file a suit for damages against the offenders by the aggrieved persons. It is the duty of the members of the Bar Associations 'and Bar Council to educate the people and to file suits for damages against the offenders apart from the criminal proceedings’.

12. Constitutional Torts in Pakistan

- 1) It is a matter of common place fact that governmental excesses and negligence in administrative law which cause harm to the citizens of Pakistan remain uncompensated and unaccounted for; therefore, some innovative legal thinking is needed.
- 2) The Courts under **Article 199** , grant declaratory and/or directive relief but do not provide for any monetary compensation to be made to the petitioner(s) for harm already caused by the infringement of their rights by the state.

- 3) Let the constitutional courts in Pakistan correct this gap in our law on the Indian model. India and Pakistan share many legal as well as administrative similarities – Common Law tradition, issues of abuse of governmental authority, a nascent and undeveloped Torts law jurisprudence and inefficient trial systems. The Indian judiciary has responded to this crisis in an interesting and innovative manner.
- 4) In a seminal case of **Rudul Shah v. State of Bihar [AIR 1983 SC 1086]**, the petitioner had spent over 20 years in prison even after he had been acquitted. The Indian Supreme Court not only directed the State of Bihar to release the petitioner from prison, but in an act of judicial law-making, also ordered that the petitioner be compensated monetarily by the State of Bihar for the 20 years he had spent languishing in jail. The Indian Supreme Court ordered this compensation to be paid in its constitutional jurisdiction and held no trial for the quantification of damages, as is the normal procedure for tort cases.
- 5) In **Saheli v. Commissioner of Police, Delhi 1990 AIR 513**, the state was held liable for the tortious acts of its employees when a 9-year-old boy died after a police officer beat him in excess of the power vested in him. The Court directed the government to pay Rs. 750,000/ as compensation to the mother of the child.
- 6) In **Chairman Railway Board V. Chandrima Das (2000) 2 SCC 465**, the petitioner was a victim of rape by employees at a railway station and the Railway Board was held liable for compensatory and punitive damages.
- 7) Pakistan is now ripe for the adoption of the jurisprudence of ‘constitutional torts’ especially when India and Pakistan share many similarities like

having Common Law foundations, issues of abuse of governmental authority, a nascent and undeveloped tort law jurisprudence and inefficient and time-consuming trial courts.

- 8) The existence of the proposed tortious remedy available to a petitioner through the constitutional jurisdiction of the court under Article 199 may provide much required checks on the NAB to carry out state actions with a reasonable duty to care and avoid harm when especially when the highest Court of the land has observed that: *‘there is the growing perception that accountability process being pursued in the country at present is lopsided and is a part of political engineering* (The News) 12-9-2019 and that NAB is an *‘exploitive agency’* (The News 20-1-2020) and ‘doing discriminatory and selective accountability’

13. Recommendations

1. This is an era of human rights protecting right to life, liberty and dignity. Dignity is the very basis of all the human rights. The UDHR, ICCPR, IESCR and CAT have declared all the basic human rights to be protected by all the state organs. The Constitution of Pakistan, 1973, has adopted all the international human rights and most of such rights have been made justiciable.
2. The power to arrest in the hands of the State is an infringement of fundamental rights; hence, all international and regional human rights instruments and national Constitutions have tried to lay down safeguards to strike a balance between the power to arrest and human rights. The international and municipal courts have risen to the occasion and are progressively laying down a new humane jurisprudence balancing these two public policies.

3. In the light of the preceding discussion, it can safely be concluded that the constitutional Courts of Pakistan may lay down stringent tests guiding the Chairman NAB in the exercise of its power to arrest.
4. It is proposed that the Chairman NAB may only arrest an accused when the following conditions are met:
 - 1) The Chairman NAB shall carefully consider:
 - i. Whether the Chairman has objective reasons to believe that a serious offence had been committed? And
 - ii. Whether the Chairman has objective reasons to believe that the accused was guilty of the offence?
 - 2) The Chairman NAB, while issuing an arrest order shall ask from himself that:
 - (v) Whether there is a reasonable justification for some interference with the presumption of innocence; and
 - (vi) Whether that interference is proportionate.
 - 3) The Chairman NAB, while issuing an arrest order, shall diligently consider the maxim that it is better that ten guilty persons escape than that one innocent suffers by the arrest;
 - 4) The Chairman shall have justifiable and objective reasons to believe that it is indispensable to arrest him and denying to him all such amenities and facilities, even to those faculties by which life is enjoyed, which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally;

- 5) An accused shall not be arrested unless the Chairman has justifiable and objective reasons to believe that it is indispensable to arrest him and denying to him security of person i.e. freedom from injury to the body and the mind, or bodily and mental integrity as arrest and detention can cause incalculable harm to the reputation and self -esteem of a person and casts scars forever;
- 6) An accused shall not be arrested unless the Chairman has justifiable and objective reasons to believe that it is indispensable to arrest him and infringing his right to a fair trial that is definitely infringed upon arrest;
- 7) An accused shall not be arrested unless the Chairman has justifiable and objective reasons to believe that it is indispensable to arrest him and infringe his right to freedom of movement;
- 8) An accused shall not be arrested unless the Chairman has justifiable and objective reasons to believe that it is indispensable to arrest him and infringing the absolute and unqualified right inviolability of dignity of man involving moral integrity and sense of personal identity and whether the arrest would cause an extreme embarrassment, humiliation, or discomfort that would be considered disrespectful;
- 9) The Chairman shall carefully and diligently consider while issuing an arrest order that whether the arrest is arbitrary and while considering arbitrariness of the arrest, he shall consider:
 - (i) Whether the arrest and deprivation of liberty of a person is within the confines of nationally recognized laws, including case law, and international standards?;
 - (ii) Whereas the arrest is appropriate, fair, just, foreseeable or proportionate in the circumstances?.

- (iii) Whether the arrest is not proportional to the legal objectives;
- (iv) Whether the grounds for the arrest are legal;
- (v) Whether the arrest is without fair, solid and substantial cause;
- (vi) Whether the procedural rights of the victim are respected and the arrested accused is informed of the reasons for the arrest;
- (vii) Whether the arrest is reasonable;
- (viii) Whether the arrest is necessity?
- (ix) Whether the arrest is discriminatory; and
- (x) Whether the arrest is unduly intrusive vis-à-vis other rights.

10) While considering the necessity of the arrest, the Chairman NAB shall carefully consider the following:

- (i) The situation of the accused;
- (ii) The nature of the offence;
- (iii) The circumstances of the offence;
- (iv) The needs of the investigation;
- (v) Availability of less intrusive and alternative means;
- (vi) Whether the accused is likely to abscond and evade the processes of law;
- (vii) Whether the accused is likely to commit further offences unless his movements are brought under restraint; and
- (viii) Whether the accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

- 11) The Chairman shall put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve?
- 12) The Chairman shall carefully consider that many routine safeguards and interim reliefs that are available in normal crimes, including murder and terrorism, are not available to the arrested person under the NAO; therefore, his power to arrest shall be exercised with greatest possible care, due diligence, and circumscription;
- 13) It shall not be the general rule but a strictly construed exception that a person under enquiry or investigation shall be detained in custody;
- 14) The Chairman shall carefully consider that an arrest which is beyond the provisions of law would be illegal and void per se;
- 15) The Chairman shall carefully ponder that an illegal, unlawful and arbitrary arrest is false imprisonment and it can lead to malicious prosecution and suits for damages.